

**THE UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

**JAMES FRESSELLA, and  
BABYBOOMERSOLUTIONS.COM, INC.,  
d/b/a BABY BOOMERS SOLUTIONS,**

**Plaintiffs,**

**v.**

**JARED CALDARA, JOHN and JANE  
DOES 1 to 10,**

**Defendants,**

**Civil Action No.: 2:12-cv-00436-CCC-JAD**

**REPORT AND RECOMMENDATION**

**JOSEPH A. DICKSON, U.S.M.J.**

This matter comes before the Court on Order to Show Cause requiring plaintiffs James Fressella and BabyBoomersolutions.com, Inc. d/b/a Baby Boomers Solutions (together, "Plaintiffs") show cause why the Court should not dismiss this action with prejudice for failure to prosecute. The parties had the opportunity to submit briefs and oral argument was heard on March 20, 2013. After having considered the parties' submissions, and for good cause shown; and

**WHEREAS** Plaintiffs filed the Complaint on January 25, 2012 (ECF No. 1); and

**WHEREAS** the parties participated in a settlement conference with Magistrate Judge Joseph A. Dickson on August 8, 2011, which was unsuccessful. At the conclusion of the settlement conference, Judge Dickson directed the parties to submit a proposed joint discovery plan on or before August 24, 2013; and

**WHEREAS** the parties did not submit a proposed discovery plan in accordance with the Court's directive and no further action has been taken in this action since the settlement conference; and

**WHEREAS** on February 22, 2013, the Court issued an Order to Show Cause requiring Plaintiff to show cause on March 20, 2013 as to why the Court should not dismiss this action with prejudice for failure to prosecute. The Court further Ordered that Plaintiffs submit in writing any argument in response to the Order to Show Cause by March 1, 2013, and that defendant that file any written reply by March 15, 2013; and

**WHEREAS** Plaintiff did not respond to the Order to Show Cause in writing and failed to appear at the hearing on March 20, 2013; and

**WHEREAS** L.Civ.R. 41.1(a) authorizes this Court, on its own initiative, to dismiss an action that has been pending in the Court for more than 120 days without any proceedings having been taken for a lack of prosecution. See L.Civ.R. 41.1(a); and

**WHEREAS** Fed. R. Civ. P. 41(b) permits a Court to dismiss, *sua sponte*, a Complaint for failure to prosecute. See Parks v. Ingersoll-Rand Co., 380 F. App'x 190, 195-96 (3d Cir. 2010) (noting the Supreme Court held that Fed. R. Civ. P. 41(b) allows for *sua sponte* dismissals in the context of a failure to prosecute); and

**WHEREAS** a District Court may dismiss a case for failure to prosecute under Rule 41(b) where a balance of the following factors weighs in favor of dismissal: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. See Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d Cir.1984); and

**WHEREAS** the Court finds that Plaintiff, by failing to (a) submit a proposed joint discovery plan in accordance with the Court's directive; (b) prosecute the action for more than 120 days; (c) submit a written response to the Order to Show Cause; and (d) appear for the hearing on the Order to Show Cause, has (1) demonstrated personal responsibility for the delay; (2) been consistently dilatory; (3) prejudiced defendant Jared Caldara, who personally appeared for the hearing on the Order to Show Cause; (4) has shown willful conduct with respect to its failure to appear, and

**WHEREAS** the Court concludes that a sanction other than dismissal will engender more delay and be ineffective;

IT IS on this <sup>DC)</sup> 22<sup>nd</sup> day of March, 2013,

**RECOMMENDED** that this matter is dismissed with prejudice pursuant to L.Civ.R. 41.1(a) and Fed. R. Civ. P. 41(b).

  
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JOSEPH A. DICKSON, U.S.M.J.

cc: Honorable Claire C. Cecchi, U.S.D.J.